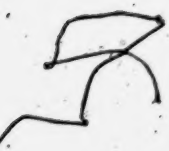

No. 545

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

THE CITY OF YONKERS, as Trustee under the Last Will and Testament of Irvin Saunders, of "The Saunders Trade School Fund,"

Petitioner,

against

WALTER F. DOWNEY, as Receiver of The First National Bank and Trust Company of Yonkers, New York.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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We respectfully refer the Court to Point I of the brief attached to the petition in *The City of Yonkers* against *Walter F. Downey* (filed contemporaneously herewith).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The City of Yonkers, as Trustee, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on August 22, 1939.

Opinion Below.

The opinion of the United States District Court for the Southern District of New York is not reported (R. 101, 102). The opinion of the United States Circuit Court of Appeals for the Second Circuit is reported in 106 F. 2d 69 (R. 127-137).

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on August 22, 1939 (R. 138). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (43 Stat. 938).

Question Presented.

The question presented by this petition is:

Whether the effect of an *ultra vires* pledge made by a national bank in New York to secure a deposit is determined (a) by the rule in the federal courts that the bank need not repay the deposit in order to obtain the return of the pledged securities or (b) by the rule in the New York courts that the bank must repay the deposit in order to obtain this return.

Statutes and Proclamations Involved.

The statutes and proclamations involved are set out in the Appendix to the petition and brief submitted contemporaneously herewith in the companion action of *The City of Yonkers* against *Walter F. Downey, Receiver.*

Companion Actions.

At about the time this action was instituted in the District Court, the Receiver instituted similar actions against The City of Yonkers, the Trustees of the Police Pension Fund of the City of Yonkers, and the Trustees of the Firemen's Pension Fund of the City of Yonkers. All four of the actions were tried separately, but in immediate succession. Appeals to the United States Circuit Court of Appeals for the Second Circuit were taken in all four actions simul-

taneously, and the appeals argued at the same time, the Court handing down one opinion bearing the caption of all four actions (R. 127). Petitions to this Court for a writ of certiorari are being made simultaneously in each of the four actions, the other three petitions being entitled

"The City of Yonkers, Petitioner, against *Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,"* October Term, 1939, No. 542,

"Joseph F. Loehr, Mayor, James J. Hushion, Comptroller and Dennis M. Morrissey, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Police Pension Fund of the City of Yonkers, Petitioners, against *Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation,"* October Term, 1939, No. 543, and

"Joseph F. Loehr, Mayor, James J. Hushion, Comptroller and Dennis M. Morrissey, Commissioner of Public Safety of The City of Yonkers, constituting the Board of Trustees of the Firemen's Pension Fund of the City of Yonkers, Petitioners, against *Walter F. Downey, Receiver of The First National Bank and Trust Company of Yonkers, in liquidation"*, October Term, 1939, No. 544.

Statement.

On July 10, 1929, the Board of Estimate and Apportionment of The City of Yonkers adopted a resolution designating certain banks as depositaries for all moneys of the City, and directing the City Treasurer to procure adequate security for all moneys deposited by him in such banks, securing the City of Yonkers against any loss of the moneys deposited and prescribing rates of interest on the general accounts which must be received (R. 66). On September 30, 1929, The First National Bank and Trust Company of

Yonkers was formed by merger of three of the depositaries named in the Resolution (R. 37).

On June 25, 1930, the so-called National Bank Enabling Amendment (12 U. S. C. 90, 46 Stat. 809) took effect. It provided:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safekeeping and prompt payment of the money so deposited, of the same kind as is authorized by the law of the State, in which such association is located in the case of other banking institutions in the State."

The banking practice and the accepted view of the law as to such pledges at the time of the passage of the Enabling Amendment and thereafter appear in the following quotation from the opinion of this Court written by Mr. Justice Black in *McNair* v. *Knott*, 302 U. S. 369, 371 (1937):

> "For many years Comptrollers of the Currency assumed that National banks had power to give security for public deposits and approved the practice of the banks in pledging such security. It has been, and is now, the policy of most states to require security for public funds whether deposited in State or National banks. The weight of judicial authority in the state courts has supported the doctrine that banks could pledge security for public deposits, but not for private deposits."

On February 28, 1933, the Court of Appeals of the State of New York handed down an opinion in *State Bank of Commerce* v. *Stone*, 261 N. Y. 175, which held that a pledge by a state bank to secure a deposit was *ultra vires* but that the assets pledged could not be recovered without repaying the deposit.

On March 4, 1933, The City of Yonkers, as Trustee, had on deposit in the Bank funds in the sum of $4,971.38 in an

account entitled "Saunders Trade School Trustees Fund" (R. 77). On that day, The City of Yonkers held bonds having a par value of $535,000 which had been pledged with it in accordance with the Resolution, as security for the deposits in the above accounts, as well as for the deposits in the accounts involved in the three companion actions (R. 79).

The Governor of the State of New York proclaimed Saturday, March 4th, and Monday, March 6th, banking holidays (R. 58), and on March 6th, the President and the Governor declared a banking holiday to and including Thursday, March 9th (R. 60). On March 20, 1933, the Comptroller of the Currency appointed a Conservator of the Bank (R. 54).

On March 28, 1933, the Conservator and the City agreed that the bank would repay the deposits to the City if the City would surrender the pledged assets. By a withdrawal of deposits from the account aggregating $4,971.38, and surrenders of securities of a par value of $534,000, this agreement was carried out (R. 45).

On February 5, 1934, after the withdrawal and surrenders, the United States Supreme Court in *Texas & Pacific Ry. Co.* v. *Pottorff*, 291 U. S. 245, held that a pledge by a national bank to secure a deposit was *ultra vires* and that the receiver of the bank could recover the pledged assets without paying back the deposits.

Thereafter this action and the three companion actions were brought by a Receiver who had succeeded the Conservator of the First National Bank and Trust Company of Yonkers (R. 56, 57) to recover the deposits which the Conservator had paid out in exchange for the pledged assets in so far as such deposits exceeded the 50% dividend to which the City would have been entitled as an unsecured depositor.

The cases were tried before a Judge in the United States District Court for the Southern District of New York, a jury having been waived by stipulation on the record (R. 19).

If the law as laid down by the New York State courts governed the consequences of the pledge either by its own force or by adoption by the federal statute, the repayment of the deposits and the return of the pledged securities was in strict accordance with the rights of the parties so that the plaintiff could not succeed.

If, however, the law as stated in the federal courts were applicable to the consequences of the pledge, the Conservator had overpaid the City when he paid out the deposits in full and recovered the pledged securities.

The District Court (R. 98) refused to find as Conclusions of Law that if the pledge was *ultra vires* the rights and obligations of the parties were determined by the laws of the State of New York (No. 31, R. 92) and that in order to recover the pledged assets it was necessary to repay the deposits in full (No. 32, R. 93), and that under the law of the State of New York state banks were "authorized" to give security in the case of public deposits (No. 26, R. 92).

The District Court found as a Conclusion of Law (No. 5, R. 89) that the Proclamation of March 6, 1933, did not create a presumption that the Bank was insolvent, but the court nevertheless found as a fact (No. 18, R. 80) that it was insolvent on that day.

Judgment was entered for $2,485.69, representing fifty per cent. of the moneys withdrawn after March 4, 1933, plus interest thereon from May, 1936, in the sum of $382.93, or a total of $2,919.55, including costs (R. 104).

The City excepted (R. 99) and assigned error on appeal to the United States Circuit Court of Appeals for the Second Circuit (R. 117, 116, 110). The latter affirmed the judgment of the District Court (R. 138).

The City argued in the Circuit Court of Appeals that the New York State common law controlled the consequences of the pledge under *Erie R. R. Co. v. Tompkins*, 304 U. S. 64 (1938), because the National Bank Act (unless it incorporated the state law by reference) made no provi-

sion as to the effect of an *ultra vires* pledge of assets to secure a deposit, and, as held in *National Bank* v. *Commonwealth*, 9 Wall. 353 (1869), there was no federal common law of national banking.

The Circuit Court of Appeals denied the validity of one of the necessary steps in that argument by holding that the National Bank Act did in effect make provision as to the consequences of an *ultra vires* pledge of assets to secure a deposit. It held (R. 134) that the matter was one of national concern and that the New York rule was directly in the face of the National Bank Act. It also held that the Enabling Amendment of the National Bank Act did not incorporate the New York state law by reference because a pledge, which only existed because of the power of a New York state bank to accept the liabilities and rights that rest upon it as a consequence of the attempted exercise of a disapproved power, could not be said to be "authorized" (R. 132).

Specification of Errors to Be Urged.

The court below erred in holding:

1. That the question of the consequences of the *ultra vires* pledge was governed by the decisions of the federal courts rather than the New York courts.

2. That the consequences of the *ultra vires* pledge were fixed by the policy of the National Bank Act.

3. That the so-called Enabling Amendment of the National Bank Act did not adopt the decisions of the New York courts as fixing the consequences of the *ultra vires* pledge.

A word should be said with respect to the holding by the Circuit Court of Appeals (R. 137) that the payments made by the Conservator (as distinguished from those made by the Bank) could be recovered because made by a public official under a mistake of law. This ground for recovery

does not exist unless there is a mistake of law, and if, as the City contended, the New York law applied, the payments instead of being made under a mistake of law were made in strict accordance with law.

Reasons for Granting the Writ.

The writ of *certiorari* should be allowed because:

I. (a) The judgment of the Circuit Court of Appeals in holding that the policy of the National Bank Act fixed the consequences of an *ultra vires* pledge, decided an important question of federal law which has not been, but should be, settled by the Supreme Court of the United States, and decided it in a way which is probably in conflict with the decisions of this Court that state laws operate "upon the dealings and contracts of national banks" except where "they expressly conflict with the laws of the United States or frustrate the purpose for which the national banks were created, or impair their efficiency to discharge the duties imposed upon them by the law of the United States" (*McClellan* v. *Chipman*, 164 U. S. 347, 357 (1896); see also *National Bank* v. *Commonwealth*, 9 Wall. 353, 362, *supra*; *Davis* v. *Elmira Savings Bank*, 161 U. S. 275 (1896));

(b) Even if the Circuit Court of Appeals were right in holding that the power to accept the consequences of an *ultra vires* act was a matter of the statutory authority of national banks under the National Bank Act, the judgment of that court in holding that no *ultra vires* power, even though effective under state law, could be said to be "authorized" within the meaning of that term as used by the Enabling Amendment to the National Bank Act, decided an important question of federal law which has not been, but should be, settled by this Court;

(c) The failure of the Circuit Court of Appeals to decide one of these two questions in favor of the application

of the state law has resulted in a situation where the City of Mount Vernon has obtained security for its deposits from a state bank and been permitted by the New York Court of Appeals to recover its deposits in full upon insolvency (*City of Mount Vernon* v. *Mount Vernon Trust Co.*, 270 N. Y. 400 (1936)), while the petitioner, the neighboring City of Yonkers, in a precisely similar relationship to a national bank, has been held in this case to be a general creditor only, all in conflict with the traditional desire of Congress to enable the national banks to compete upon a footing of equality with the state banks (*Lewis* v. *Fidelity & Deposit Co.*, 292 U. S. 559, 564 (1934)). We know of two other municipalities in the State of New York which obtained pledges from national banks to secure their deposits, and their cases and probably those of many others depend upon the decision in the case at bar.

Supporting Brief.

A petition for certiorari in the companion case of *The City of Yonkers* v. *Walter F. Downey*, No. 542, is being submitted to this Court contemporaneously with this petition. There is attached to the petition in the companion case a brief containing the argument of the petitioner therein in support of its reasons for granting the writ. The facts in that case and this case are substantially the same, except that the amounts of the deposits and withdrawals differ, and that none of the withdrawals in this case were made prior to the date on which the Comptroller took over the Bank. Since the reasons set forth above herein and the argument in support thereof are identical to some of the reasons in the companion case, we respectfully refer the Court to Point I of the brief attached to the petition in *The City of Yonkers* v. *Walter F. Downey*, No. 542, for petitioners' argument in support of the foregoing reasons. Point II of the brief in the companion case is not material

here, since none of the deposits involved in this case were withdrawn prior to the date on which the Comptroller took over the Bank.

Conclusion

The petition for review on Writ of Certiorari should be granted.

Respectfully submitted,

E. J. Dimock,
Counsel for Petitioner.

November 18, 1939.